INTERNATIONAL LAW SECTION NEWSLETTER

THE FLORIDA BAR Vol. I. No. 1 DECEMBER 1982

Special to The Florida Bar

by Wayne Mixon
Lieutenant Governor. State of Florida

Florida's emphasis on international trade and commerce in the past few years has catapulted our state into a leading position in the world marketplace, creating new opportunities which stand to benefit every segment of our economy.

By capitalizing on our extensive peninsular coastline and strategic geographic location, Florida has built an international sector that rivals that of any in the world.

Today, the multi-cultural, multi-lingual character of our state, combined with a sophisticated network of airports and deepwater ports that has spawned a statewide infrastructure of support facilities, has boosted our annual total trade from a mere $2.1 billion in 1970 to a whopping $18.6 billion last year.

And, unlike the United States as a whole, Florida boasted a favorable trade balance in 1981 of $3.8 billion.

This translates into jobs, income, tax revenues and a healthier economy. Every aspect of life in our state, from tourism to transportation, from insurance to banking, from agriculture to construction, stands to be stimulated.

The potential is tremendous but, at the same time, the competition is fierce. The worldwide crush of competition makes it vital for us to seize every opportunity that lies before us.

Florida is not alone in seeking to strengthen its international sector. Other states also are racing to the export markets. A report by the National Governor's Association says that expenditures on overseas promotions by the states in this country have quadrupled since 1976, with two-thirds of all state international business expenditures now going for export promotion.

This means we must continue to outrun the pack of competitor states and countries to hold on to and expand our prominence in international markets.

Both Governor Graham and I are personally committed to doing everything possible to encourage our international community to grow and flourish in the international arena.

And we are eager to work in partnership with all the many elements within our state, both in the public and private sectors, to pursue greater goals. Florida is growing in international stature at almost a dizzying pace, but we believe we have barely scratched the surface of our potential.

Throughout our state, from coast to coast and city to city, in urban centers and in less-populated areas, more and more small businesses and huge corporations are recognizing the profit potential in international trade and commerce.

Florida has built an international sector that rivals that of any in the world.

World trade councils are proliferating in every region of Florida. The private sector is forming or joining organizations such as the Florida Council for International Development or the Southeast U.S./Japan Association. Established organizations such as The Florida Bar have set up special task forces or committees to focus on international activity.

For the State, the Florida Department of Commerce has stepped up its programs to promote trade and attract foreign investment. The state's efforts have intensified in each of the past four years and our future plans will take us even farther in reaching every nation with the message of all that Florida has to offer in the world marketplace.

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The Department of Commerce, through its Bureau of International Trade and Development, has as its goal to promote the sale of Florida products abroad and to attract foreign investment to Florida.

To achieve these goals, the Bureau organizes trade missions, participates in trade fairs and catalog shows, conducts export seminars for Florida businesses, provides trade leads and operates a toll-free hotline to answer questions and assist Florida firms with exporting problems.

The trade missions are vital in that they provide an opportunity for Florida businessmen and state officials to meet business leaders and government officials of other countries. From having participated in several missions, I know firsthand the benefits reaped by Florida businessmen from these trade events.

My most recent mission, to Scandinavia at the end of August, involved making contacts with representatives in tourism as well as economic development. We met with importers of citrus products, key bankers and other business leaders in Oslo, Stockholm, and Copenhagen. I also discussed the expanding State role in international activities under New Federalism with senior U.S. embassy officials.

Results of this mission are already bearing fruit. One company has made a definite decision to locate a new manufacturing plant in Central Florida in early 1983, with a projected employment of 100. Another Scandinavian firm is a solid prospect. In addition, new trade contacts were made and old ones strengthened. Other corporations who expressed interest in Florida were sent information on establishing a corporation here, state banking laws, our international banking network and other pertinent facts about Florida.

I had the honor of leading Florida's most successful trade mission ever to Peru and Chile in August, 1981. The business representatives who participated reported total sales of Florida goods and services of $14 million, an all-time record for an official Florida trade mission.

The extraordinary success of our mission was aided by the U.S. ambassadors in those countries and the presence of high ranking state officials which demonstrated Florida's commitment to reinforcing trade ties with Peru and Chile.

Another South American mission that I took part in to Argentina in 1980 also produced significant results. Projected 12-month sales emanating from that mission reached $11.4 million.

Not all missions are designed to produce immediate sales but are used instead to focus on a country's needs and lay the groundwork for future trade partnerships.

A mission I led to Haiti in November, 1981, was aimed at finding ways to improve economic conditions that have sent thousands of refugees swarming to Florida. Our group, which included experts in tourism, agriculture, economic development and public health, learned Haiti has a tremendous opportunity to expand its economic base.

Haiti's economy is based largely on tourism and agriculture, but we discovered manufacturing firms operate profitably there and potential exists for further industrialization. A committee comprised of mission members recommended implementation of intermediate and long-range marketing plans for Haiti.

A 1980 mission to Korea and Japan established good rapport and dispelled lingering impressions as Florida as only a "vacationland." Since that time, investment in and trade with Florida by both countries has intensified.

From January, 1979, through June, 1982, Florida Department of Commerce investment missions and trade shows produced $231.1 million in sales and investment and identified 244 prospects.

Lt. Governor Wayne Mixon is the 12th Lt. Governor of Florida and was recently re-elected. He is the first Lt. Governor in the state to serve two terms. He is a cattle rancher and peanut farmer from Jackson County Florida and it has recently been announced that he will become Florida Secretary of Commerce in January.

Chairman's Message

Welcome to the new International Law Section! On July 1, the International Law Committee of The Florida Bar became the International Law Section by action of the Board of Governors of The Florida Bar.

For many years the International Law Committee was a place to meet for a handful of international practitioners in the State of Florida. In addition, for the last fifteen years the committee hosted the International Law Exchange Program. The program involved a Comparative Law Seminar held in various countries in South America and Europe.

While the committee was adequately functioning for the Florida international law practice of the 1950's and 1960's, the explosion of international law practice in Florida in the 1970's required a broader based, more sophisticated and highly organized structure. Because of the growth of international law in Florida in the last decade, three other sections of The Florida Bar had formed committees in various areas of international law. However, there was no central clearing house for the dissemination of information to the broad base of international law practitioners.

There are substantial differences between the old committee and the new section. The section is a self-governing body, electing its own officers, executive council and committee chairmen. The committee had a chairman appointed at the will of the president of The Florida Bar. The section has a budget comprised of dues and CLE revenues. The committee had no funds for projects or programs. The new section has numerous committees which are: Annual Meeting, Commercial Transactions, Customs Committee, Education Committee, Immigration, International Legal Exchange Committee, International Taxation, Legislative Committee, Liaison with Other Bar Committees, Membership, Newsletter Committee, and Nominations Committee. The section will have a quarterly newsletter to inform and communicate with international lawyers around our state and nation, of which this is the first edition.

The need for an International Law Section can best be demonstrated by the fact that over 1,000 lawyers in our state became dues paying members in our first year. It is to each of you that we dedicate this first issue.

In this and future publications you will learn of the many educational and social activities of the section. It is my sincere hope and desire that you will actively participate in the activities planned. Above all, please communicate your thoughts about the contents of this publication and any suggestions you may have on how the section can better serve your needs.

Stephen N. Zack
Chairman

Section Chairman, Steve Zack, received his B.A. and J. D. from the University of Florida. He practices with Floyd, Pearson, Stewart Richman & Greer in Miami.

This newsletter is prepared and published by the International Law Section of The Florida Bar.

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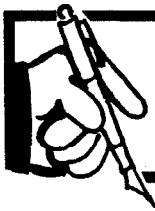

Letters to the Editor

The Threatened Elimination of the Miami Regional Customs Office

Our office has learned that the United States Customs Service is embarked on an internal investigation to determine the effect of eliminating the Miami Customs Region and placing the entire South Atlantic seaboard under the control of a Regional office at New Orleans, Louisiana. Such a move would severely threaten the coordination of Customs activities such as law enforcement and trade facilitation in Florida. Moreover, such a move would shift responsibility for manpower assignments and other functions to the Customs Regional office in New Orleans. Given the competition between New Orleans and Florida ports for freight cargo, such a shift would be of economic and psychological damage to our state.

On the merits, the proposed shift in responsibility is unwarranted. The current New Orleans Customs Region oversees only the Customs Districts in New Orleans and Mobile, Alabama. Miami Regional Headquarters administers all Customs districts in Puerto Rico, the American Virgin Islands, Florida, Georgia, North Carolina, South Carolina, Virginia and the District of Columbia. To permit New Orleans to administer our Region is to permit the guppy to swallow the whale. For strategic and geographic reasons such a consolidation does not make any sense.

The only plausible motivation for this shift is the interest of various steamship and maritime interests in Louisiana which wish to maintain the New Orleans' Customs Region. This "wish" has survived numerous studies by Customs and other agencies that have concluded there is no need for the current New Orleans Region and that its responsibilities might be divided up between the current Houston and Miami Customs Regions. Despite the clear arguments in favor of dismantling New Orleans, that Customs Region apparently survives solely on the considerable political clout of its Congressional delegation.

It has been reported that the Louisiana delegation seeks to eliminate any future threat to New Orleans' status by increasing the number of Customs district New Orleans administers. In furtherance of this objective, it has been reported that the Customs Service has agreed to initiate an internal study on the merger of the Florida Region into the New Orleans Region. Such a merger would result in control of all Florida ports through the New Orleans Region. Given the facts surrounding its birth, the study is likely to conclude in favor of New Orleans.

The public and private sector of Florida must not let this study continue. Accordingly, we must communicate this concern to insure that Florida's status as the nation's Southern gateway is not threatened. We must convince the Customs Service that it would not be in their best interest to eliminate the Miami Customs Region. It is critical that such an effort be commenced immediately to avoid any possible threat to the Miami Customs Region. I respectfully request that your organization be part of such an effort.

Very truly yours,
Thomas G. Travis
Sandler & Travis, P.A.

The Export Trading Company Act of 1982

by Ivan A. Cosimi

On October 8, President Reagan signed into existence a new law designed to promote the formation of export trading companies. This legislation is aimed at providing American businesses with an effective vehicle in helping to reverse the United States' declining export performance.

In recent times we, as a nation, have become painfully aware of the vital role our exports play in the U.S. economy. They pay for our imports. They preserve and create jobs. One job out of every eight in our manufacturing sector and one job out of every three in our agriculture sector are related to exports.

For 1980, the U.S. Department of Commerce estimated that for each billion dollars in manufactured exports, some 32,000 jobs were supported. A healthy and growing

U.S. export sector is essential to a strong U.S. economy. Yet over the last decade alone, there has been an alarming decline in the United States performance in world markets. For example, consider the following facts:

- Since 1970, the U.S. share of total world exports has declined from 15 percent to 12 percent. This represents a cumulative loss of $73 billion; our competitors have maintained or increased their shares.
- Our share of world industrial trade since 1970 has dropped from 21 percent to 17.4 percent, representing a loss of $26 billion.
- Double-digit inflation in the past few years creates a deceptive impression of a large increase in the U.S. trade. Real dollar increases are moderate, and we continue to run a deficit in our balance of payments.
- The United States has had a cumulative merchandise trade deficit of approximately $100 billion (F.A.S. basis) over the past five years. In 1980, our trade deficit was $24 billion.

The purpose of the Export Trading Company Act is to increase U.S. exports through the formation of export trading companies which would serve as export intermediaries for U.S. companies.

- At the same time, U.S. companies have lost a significant share of the domestic U.S. market to imports, and the growth of U.S. productivity in manufacturing has lagged behind that of our competitors.
- The major share of U.S. exports comes from large firms; only one percent of U.S. firms accounts for 80 percent of U.S. exports.

The purpose of the Export Trading Company Act is to increase U.S. exports through the formation of export trading companies which would serve as export intermediaries for U.S. companies. Presently, tens of thousands of small- and medium-sized companies produce goods and services which could be competitive overseas. These companies have not entered the foreign markets in large part because of their unfamiliarity with foreign customs, language, and laws, and the tremendous costs and risks involved in developing overseas markets.

Export trading companies can tap this potential export resource by providing the full range of export services and functions to these companies. By diversifying trade risks and achieving economies of scale in export trade services, export trading companies can serve as the ideal intermediaries to facilitate these exports.

Bank participation in export trading companies provides the financial resources and expertise that will be essential ingredients to the success of export trading companies. Government regulation until now had excluded U.S. banks from offering most export services. Similarly, antitrust uncertainties had deterred U.S. companies from cooperating in their export activities.

This new law allows bank participation in and ownership of export trading companies under strictly regulated conditions. It also amends the Webb-Pomerene Act by extending its application to the export of services as well as goods, and by providing for a pre-clearance certification process to ensure that specified activities and methods of operation are not in violation of the antitrust laws.

In addition, the Export Trading Company Act directs the Export-Import Bank to provide loan guarantees to export trading companies when the private credit market is inadequate, and requires the Secretary of Commerce to promote the formation and operation of export trading companies.

Under the Act, an export trading company is a company organized and operated principally for the purpose of (1) exporting goods and services, and (2) providing export-related services to other companies unrelated to the export trading company. This simple definition is intended to allow U.S. companies great freedom to form export trading companies which will best serve their needs. In addition to exporting products and services of their member companies, it is expected that ETC's will provide export-related services to companies which are not ETC members, and thereby help these unrelated or unaffiliated companies increase their exports.

The Act also provides antitrust certification for export trading associations (ETAs). The major difference between an ETC and an ETA is that an ETA must be engaged solely in the export of goods and services, whereas ETCs are to be organized *principally* for exporting goods and services and to provide export facilitating services to unrelated clients.

see "Export Trading", p. 21

Export Trading Company Seminar:
Report of Section CLE Committee

The Section will sponsor a seminar, in cooperation with the International Business Committee of the Corporation, Banking and Business Law Section, at the Bar's Midyear Meeting to be held in Miami on January 28, 1983, entitled, "Law of Export Trade: An analysis of the New Export Trading Company Act and Other Select Export Trade Problems." The morning session will deal exclusively with the new Export Trading Company Act signed into law by President Reagan on October 8, 1982. The afternoon session will deal with a few of the more important aspects of export trade.

The overall scope of the program and particularly the presentation on the Export Trading Company Act (ETC) is most timely in light of Washington's increased emphasis on improving our exports as one of the more important means to restoring U.S. companies the power to collectively act as a cohesive financing, sales, marketing and shipping force for purpose of exporting U.S. goods. By reducing the costs and risks of international trade and providing economics of scale, ETC'S are expected to provide small and medium sized business the opportunity to participate in the global market. Japan's experience with ETC indicates they are successful in promoting exports. Over one-half of Japan's exports are channeled through ETC's. Furthermore, export trading companies are expected to have a significant effect on South Florida's export business because it allows banks, including Edge Act subsidiaries, to operate in partnership with manufacturing and service companies for the purpose of generating U.S. exports. This partnership should provide exporters with new opportunities to obtain export financing.

The schedule for the Midyear Seminar is:

FRIDAY, JANUARY 28, 1983

9:00-9:10 a.m.	**Introduction**	**Steve Zack** **Tom Travis**
9:10-9:50 a.m.	**Overview of Export Trading Company Act**	**Coleman Cohen** **Vice President, Emergency Committee for American Trade, Washington, D.C.**
9:50-10:30 a.m.	**Legal Aspects of Business Operating an Export Trading Company**	**Patricia A. Sherman, Counsel & Manager, International Trade Policy Development** **General Electric Company** **New York, New York**
10:30-10:45 a.m.	**Coffee Break**	
11:00-11:25 a.m.	**Bank Operated Export Trading Company - A Legal Perspective**	**Mary Belle Feltenstein, Esq.** **Vice President & Associate** **First National Bank of Boston**
11:25-12:05 p.m.	**U.S. Antitrust Aspects Applicable to Export Trading Companies**	**Professor Allan C. Swan** **University of Miami School of Law**
12:05-2:00 p.m.	**Lunch Break**	
2:00-2:40 p.m.	**Federal Income Tax Aspects of Exports**	**Professor David Hudson** **University of Florida College of Law**

2:40-3:20 p.m.	Export Financing - Governmental and Other Programs	Sergio J. Mosvidal Senior Vice President, Irving Trust International Bank, Miami
3:20-3:30 p.m.	Break	
3:30-4:10 p.m.	Legal Aspects of Export Letters of Credits and Acceptances	Scott L. Baena, Esq. Stroock, Stroock & Lavan Miami
4:10-4:50 p.m.	U.S. Export Controls - Laws and Restrictions for Imports and Exports Including Operation Exodus and the Current Emphasis on Enforcement	Thomas G. Travis, Esq. Sandler & Travis Miami
5:30-6:30 p.m.	International Law Reception	

DESIGNATION CREDIT AVAILABLE:

Corporation & Business Law ..... 6 hours
General Practice ..... 6 hours
International Law ..... 6 hours

Any combination of the above may be used providing the total does not equal more than six (6) hours.

REGISTER FOR MIDYEAR MEETING

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Florida Responds Quickly to Newly Adopted Convention on International Documents

by Eric Schaal,
Senior Counsel, Harris Corporation, Melbourne, Florida

The United States has acceded to the 1961 Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents, effective October 15,1981. (Florida Bar *Journal,* December, 1981, Vo. 67 at 1705).

The Convention abolishes the cumbersome legalization procedure which required notarized documents to be authenticated first by the county clerk, then by the Secretary of State and finally by the consular authority of the foreign country in which the document was to be used. Under the Convention, a notarized document may be sent directly to the state official responsible for certification of documents used-outside the state for a standardized certification form referred to as an "Apostille". Upon certification by Apostille, the document may be used in the foreign country without further legalization.

The following countries, other parties to the Convention, will accept the Apostille in place of previous legalisation requirements.

Austria
Bahamas
Belgium
Botswana
Cyprus
Fiji
France
Germany, Federal Republic of
Hungary
Israel
Italy
Japan
Lesotho
Liechtenstein
Luxembourg
Malawi
Malta
Mauritius
Netherlands
Portugal
Seychelles
Spain
Suriname
Swaziland
Switzerland
Tonga
United Kingdom of Great Britain and Northern Ireland
Yugoslavia

Persons in Florida may take advantage of this new procedure by simply sending the document requiring certification to the Florida Bureau of Notaries Public, Capitol Building, Tallahassee, Florida 32304. The fee for issuance of an Apostille is $5 per document to be certified. No delays have been encountered in obtaining several Apostilles recently.

The text of the Hague Convention may be found in the 1982 Supplement to 28 U. S.C.A. under Federal Rule of Civil Procedure 44 as well as in Volume VIII of the 1982 Martindale-Hubbell Legal Directory at 4639.

Immigration by Foreign Business Investors

by Deborah J. Townsend

Reflecting an international politico-economic condition whose end is not in sight, the influx of foreign investors into Florida in recent years has been, and in all probability will continue to be, enormous. Not surprisingly, a substantial number of these businessmen are small to medium-sized entrepreneurs which, considering the relative scarcity of applicable provisions in the Immigration and Nationality Act, demands of the immigration practitioner a certain resourcefulness in using the tools that are available to him.

This article focuses upon the entrepreneur - the nonimmigrant visas available to him, namely those known as B-1, E and L-1, and the several means by which he may achieve permanent resident status.

The appropriateness of a particular visa classification, of course, depends entirely upon the facts of any given case. Considerations to be weighed include: the nature and size of the particular investment, the extent to which the investor intends to involve himself in the management of the investment, and in what capacity, and the investor's long range immigration objectives. More specifically, the investor may wish to remain a foreign domiciliary, coming to the U.S. periodically to oversee his investment, but with no intention of establishing a U.S. residence; or, he may desire to reside in the U.S. for an indefinite period of time for so long as it takes to establish and secure his investment and then return abroad; or, he may wish to abandon his foreign residence and permanently immigrate. The possibilities in this regard are numerous.

B-1 Business Visitor Visa

The B-1 visa facilitates temporary visitors for business and is available to nonresident aliens who do not intend to abandon their foreign residences and are compensated by their foreign employer (which may have a U.S. branch office or be a multi-national corporation) or are self employed abroad.[1]

Although the B-1 is one of the less difficult visas to obtain, its limitations are several. The maximum length of admission, excluding renewals, for example, is six (6) months, with 60 to 90 days being more common. Furthermore, the services rendered by the alien within the U.S. must be incidental to international trade or commerce and principally benefit his foreign employer, thereby precluding the use of the visa to conduct purely domestic business. While the B-1 permits such activities as participating in business conferences, engaging in commercial transactions, negotiating contracts or looking for investments or real estate, it prohibits the alien from accepting employment in the U.S. which may possibly displace U.S. workers.

The entrepreneur's use of the B-1 as an investment vehicle is accordingly limited to making either passive or active, but third-party managed, U.S. investments.

E-1 Treaty Trader and E-2 Treaty Investor Visas

For the serious investor who desires to remain in the U.S. in order to actively manage his investment, the E-1 "Treaty Trader" or E-2 "Treaty Investor" visa provides an excellent solution. Available solely to nationals of countries with which the U.S. has a treaty of friendship, commerce and navigation employed by foreign or domestic corporations, 51% or more of whose stock is owned by persons of the alien's nationality, these visas allow an investor who qualifies to carry on substantial trade principally between the U.S. and his country of nationality (E-l), or to direct and develop the operations of an enterprise of which he has invested or is actively in the process of investing a substantial amount of capital (E-2). A common requirement of either category of an E visa holder is that he must perform in an executive or managerial position or may possess specialized knowledge when essential to his U.S. position.[2]

With regard to the E-2 treaty investor, the term "substantial investment" depends upon the nature of the enterprise, but excludes an investment of a small amount of capital in a marginal enterprise solely for the purpose of earning a living. While no threshold dollar amount makes the investment substantial, $100,000.00 is a recommended minimum. Furthermore, the treaty investor must make a substantial investment in an actioe rather than a passive U.S. enterprise. For example, the acquisition of raw land would be considered a

passive investment whereas the purchase and inanagement of an office building would be deemed to be "active."

While the E visas are generally granted for periods of one year, they are subject to potentially indefinite annual renewals upon a continued showing that the E visa holder remains actively involved in managing the subject trade or investment.

L-1 Intra-Company Transferee Visa

The L-1 **visa is an increasingly popular visa among aliens who do not qualify for E visas and who ultimately want to establish permanent residence in the U.S. Intended by Congress as a means of enabling multi-national corporations to temporarily transfer their key managers, executives and/or specialized personnel with relative ease, an intra-company transferee is thus defined as:**

> **"An alien who, immediately preceding the time of his application for admission into the U. S., has been employed continuously for one year by a firm or corporation or other legal entity and seeks to enter the U.S. temporarily in order to continue to render his services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive or involving specialized knowledge. . . .[3]**

A close examination of the various nonimmigrant and immigrant visa options available to a foreign business investor reveals that there is no one universally desirable course to follow in planning a business investor's case.

The elements of a successful intra-company transferee petition merely track the statutory language and are otherwise straightforward:

(1) Employment for at least one year abroad by a parent, subsidiary or affiliate company in a managerial, executive or specialized capacity;

(2) The correct corporate relationship between the business entity abroad and the business entity in the U. S.; and

(3) Nonimmigrant intent.

The fact remains, however, that despite Congress' intention in establishing the L-1 nonimmigrant category, the above-cited broad statutory language has enabled many small companies and individual investors to benefit therefrom. The INS has adopted the policy that the statute does not limit the use of the L category to large, monolithic companies and does not require the companies to be conducting international trade. The implication of this position is that an alien who is the majority or even sole shareholder of both business entities are legally separate from the shareholder(s).

As an investment mechanism, then, the L-1 may be used by a transferred employee of a corporation to oversee his personal U .S. investments which are independent of his L-1 employment, by a corporate investor to transfer its managers, executives and/or specialized personnel to its subsidiary or affiliate and to transfer the entrepreneur who has established foreign and U.S. companies which are affiliated through his common ownership.

Achieving Permanent Resident Status

Applicants for permanent residence are subject to the Numerical Limitations System, the former quota system, which limits the number of annually available immigrant visas to 270,000, of which each foreign state is allotted 20,000 per year. Exempt from the visa number availability requirement are immediate relatives of U.S. citizens (parents, spouses and unmarried minor children), certain "special immigrants" and asylees.

With the above-noted exceptions, immigrant visas are allocated to applicants in order of various preference classes according to their country of birth and in order of filing. There are six such preference categories for intending permanent residents:

(1) Unmarried sons or daughters of U.S. citizens;

(2) Spouses and unmarried sons and daughters of lawful permanent residents;

(3) Members of the professions or persons of exceptional ability in the arts and sciences;

(4) Married sons and daughters of U.S. citizens;

(5) Brothers or sisters of U.S. citizens 21 years or older; and

(6) Skilled and unskilled workers in short **supply.**[4]

The first, second, fourth and fifth preference categories are referred to as "realtive preferences" and the third and sixth

continued. . .

as "occupational preferences". As the relative preferences offer the more straightforward and, with the present exception of the fifth preference category, the more expeditious approach to obtaining permanent residence, the practitioner is well advised to check with his investor client to insure that none of the relative preference categories are available to him.

Absent eligibility under the relative preferences, investors holding B-1, E, and L-1 visas may acquire permanent residence under the occupational preferences provided they fulfill the criteria for third or sixth preference. Occupational preferences generally require a U.S. job offer and a U.S. Department of Labor certification that qualified U.S. workers are unavailable, unwilling, or not suited for the position (labor certification) or the position must be pre-certified as being an occupation in short supply (Schedule A occupation). More specifically, the third preference is available for "members of the professions or persons of exceptional ability in the arts or sciences", whereas the sixth preference is available to both skilled and unskilled workers. Sixth preference encompasses most investor applicants.

Generally speaking, the investor who entered the U.S. on a B-1 or E visa and is self employed must establish an arm's length entity which can file on his behalf in order to proceed with a labor certification and preference petition. The petitioner, in turn, must establish to the satisfaction of the Department of Labor that the investor has the experience, education, and training necessary to properly fill the position and that no able, willing, and qualified U.S. workers can be found to fill it. In certain instances, however, the B or E holder may enjoy the advantages of pre-certification by establishing that either he has exceptional ability in the sciences or arts who intends to continue to practice the same science or art in the U.S. (Schedule A, Group II) or that he is eligible for an L visa (Schedule A, Group IV).

As indicated above, the investor who holds an L-1 intra-company transferee visa based on managerial or executive employment is automatically entitled to pre-certification under Schedule A, Group IV. This provision applies solely to aliens who are serving as managers and/or executives and not those who obtain their L-1 visa due to their specialized knowledge or expertise. A successful Schedule A application further depends upon the petitioning organization having been in existence, conducting business for at least one year prior to the date of the application.

A close examination of the various nonimmigrant and immigrant visa options available to a foreign business investor reveals that there is no one universally desirable course to follow in planning a business investor's case. Great care should be taken in ascertaining the business investor's long-range objections and planning accordingly.

FOOTNOTES:

[1] The B-1 status is defined in Section 10l(a) (15)(B) of the immigration and Nationality Act, 8 U. S. C., Section l101(a)(15) (b).

[2] This visa category is authorized by Section 101(a) (15)(e) of the Immigration and Nationality Act, 8 U. S.C., Section ll0l(a) (15)(E).

[3] 101(a)(15)(L) Immigration and Nationality Act, 8 U.S.C., Section l101(a)(15)(L).

[4] Section 203(a), Immigration and Nationality Act.

Deborah]. Townsend,].D. Albany Law School, Union University, 1979, member of New York Bar and The Florida Bar; with the firm of Hendry, Stoner, Sims & Sawicki, P.A., Orlando, Florida.

Newsletter Committee Report

by Gilbert Lee Sandler

The publication you are now reading is the first Newsletter issued by the International Law Section of The Florida Bar. While this issue is not likely to be a collector's item, it if our first effort to establish a periodic dialogue and exchange of useful information designed for Florida Bar members engaged in the broad range of services categorized as International Law.

We are pleased that our first issue includes articles by two government officials who have played significant roles in the growth of international trade in the State of Florida. One article is by Wayne Mixon, recently re-elected Lieutenant Governor of the State of Florida and more recently appointed to head the Florida State Department of Commerce. The second is by Ivan Cosimi, Regional Managing Director of the United States Department of Commerce.

The Section Newsletter will be issued on a quarterly basis. We expect the editorial con-

tent of the Newsletter will evolve during the course of future issues so as to include the following types of articles:

• News items and reports reflecting the activities of the Section and its various committees, short synopses of recent court cases, Federal and State Legislation. We also will report on activities of interest to the Bar which come to our attention from the World Trade Clubs throughout the State of Florida as well as from other International Law committees within The Florida Bar and other Bar associations.

• Substantive articles, prepared both by members and non-members of this Section, which discuss issues of interest to International Law practitioners. These articles are published as a forum for the practitioner, representing information and opinions held by the individual authors rather than by the Section or by the Bar. We will be pleased to publish comments or responses to any of the opinions expressed in the articles contained in this or future issues.

• Feature articles on matters which are of interest to international practitioners but are not directly involved with the substance of their practice. For example, the Newsletter may contain features concerning more efficient and economic ways to travel, guides to restaurants or other conveniences in foreign countries, etc.

One restriction in the content of the Newsletter is imposed by the six week period required to print and distribute the Newsletter. This gap in time from completing an article to actually distributing it, limits the type of news and information which may be included in the Newsletter. Accordingly, items about rapidly developing or changing issues will be published in the monthly Florida Bar News rather than in this Newsletter.

Finally, the ability of the Newsletter to grow into a meaningful publication for Section members depends upon participation of Section members throughout the State involved in every aspect of International Law. All written contributions for future issues, and comments on this issue and our future plans are more than welcome. Members are needed for the publications committee to write and review articles, and to develop plans for future issues. Interested members should contact the editor (Gilbert Lee Sandler in Miami, at (305/358-2410))or Deborah Ginn at The Florida Bar (904/222-5286).

FIRPTA-Reporting Regs —at Last

by Robert R. Hendry

At long last temporary regulations were issued by the Treasury Department on September 16, 1982. §6a.6039C these regulations provide that the returns required by §6039C of the code must be filed no later than May 15, of the calendar year, following the calendar year covered by the returns. Information returns for calendar years 1980 and 1981, must be filed no later than nine months after the date of publication of the regs in the Federal Register.

Returns are required by Code §6039C to be filed by any domestic corporation that was a U.S. real property holding corporation as defined in §6a.897-2C during the calendar year or the four preceding calendar years. For purposes of this section, calendar years prior to 1980 are not taken into account.

In addition to U.S. real property holding corporations, persons who hold an interest in a domestic corporation which was a U.S. real property holding corporation, at any time during the calendar year or any one of the preceding years, must file form 6659 for the calendar year, if that person holds the interest as a nominee either directly or indirectly through one or more other nominees, for a beneficial owner of the interest who is a foreign person.

Domestic corporations which are not U.S. real property holding corporations, for the applicable period are not required to file. Domestic corporations may however, be requested by the service to show that they were not required to report under the section because they were not U.S. real property holding corporations during the period in question.

One of the long awaited sections of the regulation is §6a6039C-5(a) which makes provision for the furnishing of security instead of the filing of the information return. Broad discretion is given to the District Director, Foreign Operations, to insure that any tax that may be imposed by Chapter I of the Code, will be paid.

Reg. §6a6039C-5(b) authorizes the District Director, Foreign Operations to specifically examine the facts of each case. The Director may accept but is not limited to, recorded security interests in real property located in the U.S. with sufficient priority to protect the government's interest, funds or other property

continued . . .

placed in escrow, letters of credit, bonds executed with satisfactory security and evidence of binding voluntary withholding agreements which assure payment of tax on the disposition of U.S. real property interests.

Guarantee agreements may be made by the entity for the payment of the tax owed by the entity or any direct or indirect owner if the entity is engaged in the conduct of a trade or business within the U. S., the Director determines it has substantial assets within the U. S., the Director is satisfied that the entity will not be liquidated and its assets disposed of and the Director is satisfied that the entity has sufficient assets to pay the taxes.

The amount of the security to be required must cover the excess of the sum of the appraised fair market value of the U.S. real property interest held by the entity over the sum of their adjusted basis, multiplied by a percentage which equals the greater of the maximum income tax rate applicable to long term capital gain of the person required to file. The Director may raise or lower the amount required but it shall not exceed the excess of the appraised value over the tax basis multiplied by the ordinary income tax rate. The appraisals must be made within sixty days of the close of the calendar year and determined as of December 31 of the calendar year to which the security agreement relates.

Foreign persons holding a U.S. real property interest must file Form 6661 if the fair market value of the U.S. real property interest owned by them exceeds $50,000.

Avoidance of the necessity of filing the return will be significant to many owners of U.S. real property interests. The regs require that the name and address, if known by the corporation, of each foreign shareholder, other than those owning publicly traded stock, be reported by the corporation. Information required by the Treasury Department will be furnished to those countries with which the U.S. has a tax treaty, in most instances, and is considered to be available to others if they seek it hard enough.

Foreign corporations, partnerships, trusts and estates are in a similar manner required by regulation §6a6039C-3 to report when they have a substantial investor in U.S. real property. This report is required to be filed on Form 6660. A substantial investor in U.S. real property is defined as "any foreign person who holds an interest in a partnership, trust or estate, (whether domestic or foreign), or any person (whether domestic or foreign), who holds an interest in a foreign corporation if. . . the fair market value of the person's pro-rata share . . . of the U.S. real property interests held by the entity exceeds $50,000." Regulation §6a6039C-3(b)(i) (ii).

Foreign persons holding a U.S. real property interest must file Form 6661 if the fair market value of the U.S. real property interest owned by them exceeds $50,000 in value subject to some limited exemptions and the right to avoid filing by furnishing security. Since the furnishing of security could result in some substantial disclosure in certain circumstances in and of itself, care should be taken in the method of security arranged where the property is directly held. Records of the Treasury Department may be considered to create more ease of discovery than real property records of the thousands of counties in the United States.

The examples under regulation 6a6039C-3 indicate that the intent of the law is to trace every ownership interest down to a pro-rata value of $50,000. This could trace through so many tiers of corporations as to cause significant problems in the planning of investment structures from other countries. Care must be taken to insure that either required information is available for reporting or security is available to avoid reporting requirements.

Taken as a whole, the publication of these regulations may have simplified the decision making process for an attorney advising clients on the availability of any degree of anonymity. The advice may be more complicated but the decision making process in arriving at the advice, has some of the uncertainty removed.

Robert R. Hendry received his J.D. from the University of Florida, College of Law in 1963. He is a past chairman of the International Law Committee of The Florida Bar, a member of the Executive Council of the International Law Section of The Florida Bar and a member of the International Law Advisory Committee, The Florida Bar. He is a member of the firm of Hendry, Stoner, Sims & Sawicki, P.A., Orlando, Florida.

European Community Report:

Attorney-Client Privilege and Antitrust Regulations

by Eric Schaal,
Senior Counsel, Harris Corporation, Melbourne, Florida

EEC Accepts but Strictly Limits Attorney-Client Privilege

In a decision by the Court of Justice of the European Economic Community in May of this year, *Australian Mining and Smelting Europe Limited* ("AM&S"), Case No. 155/79 (1982 CCH Common Market Reports para. 8757), the nature and scope of the attomey-client privilege ("legal privilege") within the EEC were reviewed for the first time. The Court upheld the legal privilege in a case involving the investigatory powers of the EEC Commission under Article 14 of Regulation 17/62 (one of the regulations implemented under the competition rules of the Treaty of Rome). *

The legal privilege was held to protect written communications between a lawyer and a client subject to satisfaction of two conditions. The first condition is that the communication be made for the purposes and in the interests of the client's right of defense. It may cover a communication made before or after initiation of a procedure by the Commission, provided such communication had a "relationship to the subject matter of that procedure." The second condition is that the communication be with an independent lawyer, that is to say, a lawyer who is not bound to the client by a relationship of employment. Furthermore the independent lawyer must be entitled to practice his profession in one of the member states of the EEC, regardless of the member state in which the client resides. Thus advice from in-house counsel or non-EEC qualified lawyers is not entitled to protection under the privilege.

The following issues were also decided by the Court in *AM&S:*

1) The legal privilege does not extend to communications of legal advice prepared by executives or employed lawyers even if these communications represent summaries of advice given by an independent lawyer.
2) The independent lawyer must be bound by rules of professional ethics and discipline in his member state, a qualification which could require actual enrollment in the bar and which would in turn cast a doubt on the applicability of the legal privilege to communications with lawyers whose status is limited, such as an American lawyer based in France who practices as a legal advisor *(conseil juridique)* under the French legal system.
3) The legal privilege belongs to the client who may disclose the privileged communications voluntarily without the lawyer's prior consent.
4) The Commission itself has the responsibility for deciding whether the legal privilege covers a specific communication. At the request of the Commission, the client must provide "relevant material of such a nature as to demonstrate that the communications fulfill the ocnditions for" the legal privilege, "although it is not bound to reveal the content of the communications in question". In the event of an adverse decision, the client may appeal to the European Court of Justice.

The legal privilege was held to protect written communications between a lawyer and a client subject to satisfaction of two conditions.

Although many questions regarding the legal privilege remain unanswered, the basic issues of its existence and scope have been clearly answered. Lawvers counselling European operations should take notice of the implications of the *AM&S* case on their renderinal services. Routine legal compliance programs should be tailored to the limitations imposed by *AM&S.* Specific litigation should be entrusted to lawyers who satisfy the conditions of *AM&S*. And record retention programs should be re-examined in the new light of *AM&S.*

On balance the best solution for the non-EEC lawyer may be to rely more upon oral advice.

* 1 CCH Common Market Reporter para. 2531.

Import Leasing in Brazil

Presented by Dr. Durval de Noronha Goyos, Jr., on October 28, 1982, to the Brazilian American Chamber of Commerce. The author is a partner in the law firm of Noronha, Machedo & Walter which has offices in Sao Paulo, Rio de Janeiro and Miumi, Florida.

Leasing, in Brazil, is a relatively new legal feature, as it was originally created and regulated by Law no. 6099 of September 12, 1974. Nevertheless, leasing has become a very active and quite extensive market in the country, with an outstanding credit balance of US $1.3 billion on December 30th, 1980 and US $2 billion on September, 1982. Brazilian law only contemplates the financial leasing.

Import leasing in Brazil is regulated by a variety of Laws, Decrees and Regulations, if you consider all the aspects involved, as leasing, contracts, imports, foreign capital and taxation.

General Characteristics of Import Leasing in Brazil

Leasing transactions in Brazil can only be entered between legal entities, and the assets purchased by LESSOR must be directly used by LESSEE. Leasing between interrelated companies is prohibited. Leasing contracts must include clauses specifying the assets; period of contract; value of each installment that must be paid, at the most, at six month intervals; option to purchase asset or renew contract at the LESSEE's exclusive discretion; and price to exercise purchase of asset.

Import leasing in Brazil shall have as LESSOR a legal entity domiciled abroad, and as LESSEE a Brazilian corporation operating within its economic activity.

Import leasing can only have an object, capital goods with no local similars. Import regulations shall apply to the transaction to the extent that they have not been altered for specific purposes of import leasing. Minimum leased period for imported assets is five years.

Import leasing agreements must be registered with the Central Bank of Brazil, which can refuse certain conditions, as specified in Article 16, 1st paragraph of Law 6099 at its discretion. Therefore, prior approval by the Central Bank to the respective import leasing contracts must be sought.

Tax Aspects of Capital Goods (Machinery/ Equipment) Import Leasing

Under Resolution no. 666 of December 17, 1980 of the Central Bank, capital goods imports under leasing agreements in those cases, where lessor is located abroad, are to be subject to the same taxes as regularly applicable to the regular imports, with the exceptions provided therein.

Import Tax - capital goods imports are generally subject to an import tax rate around 45 percent. The import tax is established in accordance with the nature of each specific product, and based on a table which basically follows the Brussels Nomenclature. The import tax is levied upon the normal wholesale price of the imported goods in lessor's domestic market plus freight and insurance charges.

IPI Tax (Excise Tax) - capital goods imports are generally subject to an IPI Tax ranging from 5 percent to 12 percent (the specific rate is also established for each specific product). The IPI tax is also calculated on the wholesale price of the product in lessor's domestic market plus freight and insurance charges.

Import leasing. . . has a substantial advantage over loans with respect to the length of the operations. . . . On the other hand, import leasing has patent advantages against regular imports, at least tax-wise. . . .

ICM Tax (Sales Tax) - the ICM tax legislation holds no provision regarding the application of the ICM tax on imports under leasing. However, based on the general principles governing the ICM tax - which is applied on "commercial operations" - it is our opinion that the ICM Tax is not due on subject imports under leasing. The reason for this is that leased capital goods are to be maintained as lessor's property, thereby involving no "commercialization transaction".

Income Tax - the withholding income tax rate regularly applicable to remittances abroad is 25 percent. Installment remittances to a lessor however, are subject to the following withholding income tax rates:

(i) 2.5 percent, in those cases where the total amount of the rent provided under the leasing agreement equals less than 75 percent of the price of the leased good;

(ii) 5 percent, if the total rent equals 75 percent or more of the price of the leased good.

IOF Tax (Tax on Financial and Exchange Transactions) - Normal imports are generally subject of a 25 percent IOF tax. Capital goods imports under leasing, however, are subject to the IOF tax of 90 percent of the regular IOF tax rate, i.e., 22.5 percent.

Except for the withholding income tax, all taxes indicated above are to be paid by lessee. Nevertheless, subject to Central Bank's approval, it is possible to indicate in the leasing agreement, that lessee should also bear the withholding income tax cost, i.e., that the withholding income tax should be grossed-up.

Proceedings of Import Leasing

The lessee must send to the agency of the Brazilian Bank where is registered like an importer or to the Foreign Trade Board - CACEX, the following documents:

(i) Explanation of the good's necessity and convenience, and of the non-existence of a national similar, with technical designs, value and information on the good's utility for the local operations.
(ii) Technical avaliation made by a foreign company, if the asset is used.
(iii) Letter from the lessor saying that there is not any corporate interrelations between the lessee and the lessor.
(iv) Draft of import leasing contract.

CACEX will verify the non-existence of a national similar; the relationship between the lessor's economic activity and the asset; the convenience and opportunist y of the operation; the compatibility of the good's value with the international market; and the expectation of the good's utility. After that, the process will be sent to the Central Bank of Brazil - FIRCE.

Once the certificate of registration is issued, by the Central Bank, the interested party shall, within 180 (one hundred and eighty) days, apply for the import license before CACEX.

Conclusion - Practical Observations

Import leasing has finally been regulated in Brazil, as to provide a new channel for foreign borrowing. It has a substantial advantage over loans with respect to the length of the operations (five years for leasing, against eight years for loans). On the other hand, import leasing has patent advantages against regular imports, at least tax-wise, as explained above.

Although import leasing is a new legal concept, and there have been difficulties in organizing the first operations, the country has interest in its improvement. An evidence of this fact is Decree-Law no. 1960, of September 23, 1982, that authorizes the Union to guarantee the import leasing installment payments on the amount of up to Cr $500 billion (two and a half billion dollars), when the Lessee is a government body, state or federal.

Report of Immigration and Naturalization Committee

Our Committee has set several major goals as we begin the 1982-1983 year. This year is an. important one because the subject of immigration is a "hot topic" as a result of the Simpson-Mazzoli Bill which will likely pass Congress in some form by the end of 1982, or if not, surely in 1983.

One goal of the Committee will be to educate members of The Florida Bar on this proposed new legislation which will have far reaching effects on any practitioner who deals with aliens. A second project of the Committee will be to coordinate and supervise the publication by The Florida Bar of the Immigration Law Manual which is expected to be published in early 1983.

Another important activity for this year will include liaison and meetings with other Sections of The Florida Bar on the subject of Immigration and Naturalization Law. In addition, we hope to provide speakers at other Florida CLE programs dealing with the fields that touch upon immigration and naturalization such as taxation, foreign investment, and criminal law.

The Committee also hopes to put on a seminar on current developments in the field of immigration either on the West Coast or Central Florida.

We look forward to an active and exciting year. We solicit any members of The Florida Bar who wish to become members of the Committee and contribute ideas, articles or comments.

Michael N. Weiss, Co-Chairman
Clemente Vasquez-Bello, Co-Chairman

International Law Calendar of Events

DATE	PLACE	EVENT	SPONSOR/ CONTACT
December 8, 1982	Daytona Beach, F1orida	International Trade Seminar	Fla. Dept. of Commerce (FDC) (904) 488-6124
	St. Petersburg, Fla.	International Trade Seminar	F1a. Dept. of Commerce (904) 488-6124
December 5-7	Miami, Florida	Caribbean Trade Investment & Development Conference	Caribbean/Central American Action (305) 350-7700 Ext. 31
December 6 December 7	Miami, Florida	Export Documentational Export Shipping	International Trade Institute (800) 543-2453
December 7	Miami, Florida	International Roundtable Discussion	National Association of Credit Management (305) 741-3112
December 7-9	Miami, Florida	Conference on Caribbean	Caribbean/Central American Action (305) 350-7700 Ext. 31
December 7-10	Mexico City	Representaciones Comerciales	Fla. Dept. of Commerce (904) 488-6124
December 10	Miami, Florida	Mexico Issues Management	International Center and Council of the Americas (305) 667-3621
January 1983	London, England	International Boat Show	Fla. Dept. of Commerce (904) 488-6124
January 12-16	Panama	ExpoComer Panama Trade Fair	Panama Interfair, S.A. 64-6808
January 24	Miami, Florida	Florida Economic Seminar	Florida Council of 100 (305) 813-1155
Jaunary 27-29	Miami, Florida	Florida Bar Midyear Meeting	The Florida Bar (904) 222-5286
January 28	Miami, Florida	Export Trading Company Seminar	International Law Section The Florida Bar
January 31- February 1	Miami, Florida	Financing Investments in Latin Ametica	International Center (305) 667-3621
February 2-9	New Orleans, LA.	ABA Mid-Year Meeting	American Bar Association (202) 223-4433
February 3-5	Miami, Florida	Eurodollars Conference	Florida International Bankers Assoc. (305) 667-3621
February 11-20	Kaduna, Nigeria	Kaduna Trade Fair	Fla. Dept. of Commerce
February 13-18	Miami, Florida	38th Annual Tax Conference	The Florida Bar
March/April	Columbia	Florida-Columbia Trade Mission	Fla. Dept. of Commerce
April 29-30	Miami, Florida	International Traxation Seminar	Florida Institute of Certified Public Accountants

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May	Santo Domingo San Juan, P.R.	Florida-Dominican Republic Puerto Rico Trade Mission	Fla. Dept. of Commerce
May 15-18	Toronto, Canada	Plast-Ex '83 Plastics Industry Show	Fla. Dept. of Commerce
May (lst or 2nd week)	London, England	International Law Section The Florida Bar Legal Education Program	
June 1-2	Dutch Inn Lake Buena Vista Orlando, Florida	Conference on World Trade	

New Antitrust Regulations from the Common Market

by **Eric** Schaal
Senior Counsel, Harris Corporation
Melbourne, Florida

The Commission of the European Economic Community released on July 7 the text of two draft regulations which will exempt certain bilateral exclusive dealing contracts from the application of Article 85(1)-the basic antitrust regulation which prohibits agreements in restraint of trade. See 3 CCH Common Market Reporter para. 10,406. Exclusive distribution and exclusive purchasing (i.e., requirements) contracts are dealt with by separate regulations, which replace the single group exemption regulation, Regulation No. 67/67 (1 CCH Common Market Reporter para. 2727) due to expire on December 31, 1982.

The two regulations are very similar in their basic provisions, except for portions of the exclusive purchasing regulation dealing with long-term supply agreements between breweries and taverns and those between oil companies and service stations, which are both recognized as special problems within the Common Market countries. These regulations are the culmination of several years effort to revise Reg. No. 67/67 to provide a better defined yet flexible basis of exemption. New additions to the exemption provisions include a maximum term of years for each type of exclusive dealing agreement and a maximum size for manufacturing companies entitled to exemption for so-called non-reciprocal exclusive agreements.

Exclusive Distribution

The exclusive distribution exemption applies to agreements "whereby one party agrees with the other to supply only to the other certain goods for resale within the whole or a defined area of the common market." The agreement may contain a non-compete covenant from the distributor as well as an undertaking to refrain from soliciting customers or establishing sales operations outside of the agreed territory. The agreement may also contain commitments covering the purchase of complete lines of products and of minimum quantities, the use of specified trademarks and packaging in reselling and certain mandatory sales promotional activities such as advertising, technical training, inventory stocking and after-sales service. The maximum term of such agreements is limited to three years. The regulation does not mention renewals or extensions.

New additions to the exemption provisions include a maximum term of years for each type of exclusive dealing agreement and a maximum size for manufacturing companies entitled to exemption for so-called non-reciprocal exclusive agreements.

The exemption will not be available for reciprocal exclusive distribution agreements between competing manufacturers nor for non-reciprocal exclusive distribution agreements between competing manufacturers, each of whose annual sales volume exceeds 100 million ECU (European Currency Units) presently equivalent to approximately $94 million. Nor can the exemption be claimed

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where a distributor is selling directly to consumers and no other source of supply is available. Finally the exemption will not apply to agreements where one or both parties "make it difficult" for others to obtain goods from other sources by exercising industrial property or other rights to prevent access to other sources of supply.

In addition to the limitations described in the preceding paragraph, the Commission on a case by case basis may deny the exemption where there is not effective competition for the goods subject to an exclusive agreement, or where access of other suppliers to the different stages of distribution is made difficult to a significant extent, where supplies of the goods from outside the territory to consumers or other sellers are not available on customary terms or where the distributor refuses to supply the goods to certain customers or discriminates in the treatment of such customers or sells at excessively high prices.

The regulation will take effect on January 1, 1983 and expire on January 31, 1992. Agreements which exist on January 1, 1983 and were exempt under Regulation 67/67 shall not be subject to the new regulation until after December 31, 1985.

Exclusive Purchasing

The second draft regulation applies to two-party agreements for the supply and resale of a dealer's entire requirements of certain goods for a period of not more than a year. A three year maximum term is allowed where the dealer is accorded special commercial or financial advantages. Brewery and service station agreements which are dealt with separately by the regulation are allowed a 10 year duration. Apart from the exclusive dealing inherent in a requirements contract, no restriction on competition may be imposed. Moreover the exemption may not be relied upon where a tie-in sale is involved, unlike the exclusive distribution exemption which allows imposition of a commitment to purchase a complete line of products. The second regulation contains substantially identical provisions permitting normal dealer commitments concerning use of trademarks and sales promotional activities and excluding agreements between competing manufacturers. The effective date and term of this regulation is the same as for the exclusive distribution regulation.

Increased Civil Enforcement Policy of The U.S. Customs Service

by Gilbert Lee Sandler

Recent statements issued by officials of the Customs Service in Washington, D.C. have caused widespread concern that importers will be subjected to a new government policy of harsh and severe penalties for errors and omissions in information supplied in connection with the importation of merchandise. Reacting to the government statements, several Bar Associations and import groups have filed objections with the Customs Service, requesting that the Agency avoid returning to the *in terrorem* practices which led to amendment of the Customs Civil penalty statute in 1978.

Penalties for false statements, errors or omissions in information supplied to the Customs Service for the purposes of importing merchandise are subject to civil penalties provided under Section 592 of the Tariff Act of 1930, as amended in 1978 by Public Law 95-410 (19 USCA 1592). Under that statute. the Customs Service is authorized to assess penalties for violations varying from fraudulent activity to ordinary negligence. The only exceptions to this sweeping range of penalizable activity are those violations which constitute "clerical errors or mistakes of fact" provided they are not "part of a pattern of negligent conduct." Section 592(a) (2), ***supra.***

Until adoption of the 1978 amendment, the penalty for all violations (whether negligent or fraudulent) was a monetary penalty equal to the full forfeiture value of the imported merchandise. For example, if merchandise dutiable at a rate of 5 percent was declared at a value of $10,000 rather than its proper value of $15,000, the government would have suffered a revenue loss of only $250. If the error arose from outright fraud or ordinary negligence, the penalty assessed by the Customs Service

was the same extraordinary amount: $20,000, i.e., forfeiture value of the merchandise or approximately twice its selling price to the United States. The Customs Service and the Federal Courts were without legal authority to assess a penalty in any lesser amount. However, the Customs Service could (and does) possess discretionary authority to mitigate such penalties to a lesser amount under the provisions of Section 618 of the Tariff Act of 1930 (19 USCA 1618).

The 1978 amendment to the penalty statute provided authority to assess penalties on a more reasonable basis reflecting the degree of the violator's culpability. Accordingly, penalties arising from ordinary negligence generally are assessed at twice the loss of revenue whereas violations arising from fraud are assessed at the "domestic value of the merchandise." Section 592(c) of the Tariff Act of 1930, as amended. Despite this improvement, Customs Service enforcement personnel generally continue to concentrate their attention on developing evidence to support "fraud" cases, claiming the highest possible penalties for violations. Accordingly, even under the amended law importers must rely upon the discretionary mitigation authority for reasonable and equitable treatment.

The new fear that the Customs Service will apply the amended law harshly arises from two circumstances: The Customs Service has issued unduly restrictive proposed mitigation guidelines and the Commissioner of Customs has set a strident law enforcement tone in describing his mitigation policy.

Mitigation Guidelines. Four years after amendment of the penalty statute, the Customs Service has still not issued final mitigation guidelines. An early version of mitigation guidelines was first made available to the public on June 17, 1980, but was vehemently rejected by the import community as unduly harsh and inconsistent with the liberal purposes of the 1978 amendments to Sectin 592. The draft guidelines inexplicably set substantially higher penalties for violations which did not cause a revenue loss than for violations which did deprive the government of revenue. Moreover, the guidelines were thought to unduly restrict the amount that a penalty could be reduced in the mitigation process. In response to the criticism, the Customs Service withdrew its guidelines on September 22, 1980 and solicited comments on them as if they had been released as a proposal. More than two years passed before Customs acted on the comments, by issuing new proposed guidelines on November 3,1982. During the interim, there were no final rules to guide Customs Officials issuing mitigation decisions.

The situation has not been cured by last November's proposed rules because they include many new and questionable provisions. The most critical of the new rules is the introduction of a highly restrictive test which appears to dramatically limit the circumstances in which an importer will qualify for the lower penalties provided under the "prior disclosure" provisions. The new guidelines also require payment of all penalties and withhold duties as a precondition to the filing of a second supplemental petition. The customs Service has never previously imposed such a burden on the mitigation process.

The Commissioner's Policy Statement. Last August, the import community became aware of the so-called "Camp Hoover Memorandum," an internal memorandum issued by the Commissioner of Customs which appears to set a tone of strict and harsh enforcement. The memorandum reportedly instructed Customs officials to "emphasize very strongly" their enforcement role; to act as an "advocate for the government's interest" and to act in the role of a prosecutor rather than a judge." Rather than provide importers with "excessive leniency in the mitigation process," Customs Service Headquarters officials might "increase a fine or penalty being appealed."

Reacting to the government statement, several Bar Associations and import groups have filed objections with the Customs Service, requesting that the Agency avoid returning to the* in terrorem *practices which led to amendment of the Customs Civil penalty statute in 1978.

The Commissioner's statement revived fears in the import community that small violations will give rise to large penalty claims and that efforts to mitigate those claims will go unheard. Three of the most thoughtful objections to the statement were prepared by the American Bar Association, The Customs

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and International Trade Bar Association and the Joint Industry Group.

The American Bar Association challenged the Commissioner of Customs' memorandum, pointing out that his instructions were in the nature of rule making which should be developed under the public notice provisions of the Administrative Procedure Act. An internal memorandum is not an appropriate vehicle for substantial rule making.

The Customs and International Trade Bar Association filed an objection to the Commissioner's memorandum focusing on the two distinct roles played by Customs: Under Section 592, the Customs Service is an enforcement agency responsible for developing cases and issuing penalty claims; under Section 618, the Customs Service acts in a quasi-judicial capacity responsible for an impartial look at the circumstances for the purposes of reasonably exercising a discretionary mitigation authority. The role of the prosecutor ends at the time the penalty claim is issued; the role of the judge begins upon receipt of a mitigation petition.

The Joint Industry Group, a coalition of many business associations which actively lobbied for the 1978 amendment of Section 592, filed an objection which emphasized that the tenor of the commissioner's memorandum might cause some Customs officials to return to the over zealous and abusive enforcement practices that created the climate for passage of the 1978 amendments.

Initial responses from the Customs Service to the objections from the import community are inconclusive. The newly proposed mitigation guidelines certainly do not soften the policy statements of the "Camp Hoover Memorandum," and Customs has not indicated it will issue any memorandum specifically clarifying that statement. It is expected that a dialogue on these issues will continue for some time into the future both informally and through the comments filed in response to the proposed penalty and mitigation regulations. These comments must be filed by January 3, 1983. Thus, the final and most authoritative statement of Customs Service policy on the assessment of civil penalties most likely will only become available at the time the Customs Service issues the final version of its guidelines governing mitigation of penalties under Section 592 of the Tariff Act of 1930.

Gilbert Lee Sandler, A.B., Dartmouth College (1966) and].D., NYU School of Law (1969); trial attorney, Customs Section of the United States Department of Justice (1969-1975); currently a national Committee Chairman, American Association of Exporters and Importers and Treasurer, Customs and International Trade Bar Association; member of Sandler & Travis, P.A. of Miami, Florida with firms in New York City and Washington, D.C.

CLE PUBLICATION

Maritime Law and Practice

CLE Publications has prepared a manual entitled Maritime Law And Practice. The manual is a hardbound publication consisting of 460 pages and contains 11 chapters. It is an excellent research aid and practical tool for any lawyer who might handle a maritime case, ranging from a charter problem to a collision or personal injury on the high seas or inland waters. The manual alerts the reader to the problems that might be encountered in any type of maritime action and it contains many forms. It should be of tremendous value both to the experienced maritime law practitioner and to the lawyer who, for the first time, has a client with a problem involving maritime law.

The chapter titles and authors are **Jurisdiction And Procedure,** Dewey R. Villareal, Jr.; **Personal Injury And Wrongful Death,** W. B. Milliken, Arthur Roth, William C. Norwood and C. Douglas Skinner; **Workers' Compensation,** Roger A. Vaughan and Stephen L. Rosen; **Carriage Of Goods And Charters,** Jose Garcia-Pedrosa and Christian D. Keedy; **Salvage,** Dean Joshua M. Morse III; **General Average,** Dean Joshua M. Morse III; **Collision,** Jack R. Rinard; **Marine Insurance,** Brendan P. O'Sullivan; **Maritime Liens,** Nathaniel G. W. Pieper; **Limitation Of Liability,** George Gabel, Jr.; and **Marine Pollution Liability,** Dean Joshua M. Morse III.

The price is $35 plus $1.75 sales tax. The manual may be purchased by writing to CLE Publications, The Florida Bar, Tallahassee, Florida 32301-8226.

EXPORT TRADING. cont'd.

The Export Trading Company legislation supported by the Reagan Administration is the first legislation in over a decade aimed at giving American business major new tools to penetrate and expand export markets abroad. In addition to helping seasoned exporters to do even better, we expect that it will encourage many small- and medium-sized firms to enter the export market for the first time.

Export trading companies will combine the products, skills and resources of several U.S. companies to enhance their own capabilities and those of their clients. The legislation is designed to attract producers of goods and services, banks, export management companies, freight forwarders and other export service businesses into an effective joint effort to exploit foreign markets. They may do this either to export their own products or to act as a "one-stop" service for unrelated clients.

As part of the U.S. Commerce Department's active role in supporting and promoting exports, the International Trade Administration has established the ETC Contact Facilitation Service. This computer-based clearinghouse is designed to facilitate contact between U.S. producers and export trading companies, and parties desiring to form an export trading company. Interested Florida companies can register with the Commerce Department's Miami District Office for $25 and thus be entered into a computer in Washington.

Florida companies wishing to learn more about ETC services and the specifics of the Export Trading Company Act should contact the Miami District Office at (305) 350-5267.

The key to expanding American exports lies with the private sector. The new Export Trading Company law has given the private sector the tools to do the job which it is capable of doing. Our foreign competitors have learned how to use export intermediaries. It is time that American businesses learn to do the same.

Ivan* A. *Cosimi is Regional Managing Director with overall responsibility for the U.S. Department of Commerce International Trade Administration's District Offices in the states of Florida, Georgia, Alabama, Mississippi, and the Commonwealth of Puerto Rico.

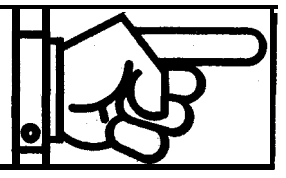
Florida Lt. Governor Wayne Mixon (center) visits the Fellesmeieriet Co. in Oslo, lurgest importer of Florida citrus in Norway, during a State economic development mission to Scandinavia Aug. 27-Sept. 4. Also pictured are (from left) State International Policy Advisor Philip Penninger, Fellesmeieriet President Ole Nygaard, U.S. Agricultural Specialist Dr. Bjorn Leborg, and U.S. Commercial Attache F. Brenne Bachmann.

The International Law Section Executive Council and Committee Chairmen met September 24, 1982 during the General Meeting of Committees and Sections at the Host Airport Hotel in Tampa. Pictured above (L—R) Stephen N. Zack, Chairman; Thomas G. Travis, Chairman-elect; Clemente L. Vazquez-Bello, Immigration Committee Chairman and John Eric Schall, Liaison with other Bar Activities Co-Chairman.

C. Timothy Corcoran III, President of the Hillsborough County Bar Association (far left) appeared before the council on behalf of the XXIII Inter-American Bar Association Conference which was held November 6-12, 1982 in Tampa. The section contributed $2,500 toward the conference.

Use this form to register for Midyear Meeting

For detailed information on meetings and events, consult your November 1 issue of The Florida Bar News, or call The Florida Bar (904/222-5286).



THIRD ANNUAL MIDYEAR MEETING

Registration and Tickets

INSTRUCTIONS: Please print or type information requested below and mail with your check, payable to The Florida Bar, to: Midyear Meeting, The Florida Bar, Tallahassee, FL 32301.

MEMBER'S NAME (First, Middle Initial, Last)	SPOUSE OR GUEST NAME, if attending
NICKNAME (as it is to appear on convention badge)	OFFICE PHONE
OFFICE ADDRESS (Street, City, State, Zip Code)	ATTORNEY NUMBER

ACTIVITY	Code	No. of Persons	Fee Per Person	Amount
Thursday, January 27				
Landlord/Tenant Seminar, sponsored by Real Property, Probate and Trust Law Section	101			
Civilian Practice with Military Clients Seminar, sponsored by Military Law Committee	102			
Communications Law Seminar, sponsored by Communications Law Committee	103			
Economic Survival in the Private Practice of Criminal Law Seminar, sponsored by Criminal Law Section	104			
Trust Accounting Seminar, sponsored by Professional Ethics Committee	105			
ALL MEMBER RECEPTION	106			
★ **DAILY REGISTRATION FEE** (entitles registrant to attend any of the above seminars and the All Member Reception. Please indicate the seminar(s) you prefer to attend.)	107		$65.00	
Luncheon sponsored by Florida Council of Bar Association Presidents for All Midyear Meeting Participants	108		$12.00	
Economics & Management of Law Practice Section Luncheon	109		$12.00	
Bar Leaders Workshop	110		No Charge	
Friday, January 28				
Real Property Problems in Probate Seminar, sponsored by Real Property, Probate & Trust Law Section	201			
Accident Reconstruction and Use of Experts Seminar, sponsored by Trial Lawyers Section	202			
Adultery and Marital Misconduct Seminar, sponsored by the Family Law Section	203			
Law of Export Trade Seminar, sponsored by International Law Section	204			
Dissolution-Tax Aspects of the Division of Jointly-Held Property Seminar, sponsored by Tax Section	205			
Administrative Law for the General Practitioner Seminar, sponsored by Administrative Law Section	206			
Economics & Management of Law Practice Section Exhibitions & Exchange	207			
Introduction to Environmental & Land Use Law Workshop, sponsored by Environmental & Land Use Law Section	208			
Highlights of the TEFRA Seminar, sponsored by Tax Section	209			
★ **DAILY REGISTRATION FEE** (entitles registrant to attend any of the above seminars. Please indicate the seminar(s) you plan to attend.)	210		$65.00	
ALL MEMBER LUNCHEON	211		$12.00	
Saturday, February 29				
Dealing with Governmental Agencies Seminar, sponsored by Government Lawyers Subcommittee, Members Relations Committee	301			
Health Law Seminar, sponsored by Health Law Committee	302			
★ **DAILY REGISTRATION FEE** (entitles registrant to attend any of the above seminars. Please indicate the seminar(s) you plan to attend.)	303		$35.00	
Florida Association for Women Lawyers Luncheon	304		$12.00	

TOTAL $ _____ ★

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